State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

New Hampshire Troopers Association Petitioner v. New Hampshire Department of Safety, Division of State Police Respondent	*	Case No. P-0754-15 Decision No. 2005-028

APPEARANCES

Representing the New Hampshire Troopers Association:

James W. Donchess, Esq.

Representing the Division of State Police, State of New Hampshire:

Marta A. Modigliani, Esq.

BACKGROUND

The New Hampshire Troopers Association (hereinafter "the Association") filed an unfair labor practice complaint on September 9, 2004 alleging that the State of New Hampshire, Division of State Police (hereinafter "Division") committed an unfair labor practice in violation of RSA 273-A:5 I (h), when it began deducting more than 8 hours of annual leave or sick time from troopers' leave accounts for each day of annual leave or sick time taken. Prior to July 1, 2004, when troopers used a day of annual leave or sick time, regardless of the scheduled length of their shift for that day, eight (8) hours of

annual leave or sick time was deducted from their respective leave account. After that date, the Association avers that the State began charging troopers who are scheduled to work more than 8 hours per shift (i.e., 8½ or 9 hour shifts) on an actual time used basis. It contends that such policy is in direct violation of Article X and Article XI of the parties' collective bargaining agreement ("CBA") that require that each trooper be given a certain number of days of leave and therefore constitutes a breach of the parties' agreement and an improper labor practice.

The Division filed an answer on September 24, 2004 generally denying the Association's charge. While the Division admits to the factual chronology of events as described in the Association's complaint, it specifically denies that it has committed any improper labor practice. The State does not dispute that effective July 1, 2004, it began deducting leave time equal to the sum of actual hours taken for leave. It states that prior to July 1, 2004, a trooper working an 8.5 hour or 9 hour regular shift who took an annual leave day on which that shift was scheduled was charged only 8 hours from his or her annual leave accumulation. The Division maintains that charging a sum equal to the number of leave hours used is in conformity with the parties' CBA and does not constitute a breach or improper labor practice.

A pre-hearing conference between counsel was conducted on October 6, 2004. An evidentiary hearing was convened at the offices of the Public Employee Labor Relations Board in Concord on November 18, 2005 at which both parties were represented by counsel, presented witnesses and exhibits and had the opportunity for cross-examination. The parties agreed and stipulated to several facts that were submitted to the Board and are included in its findings listed below as Findings of Fact #6 through #13. The Board reviewed all filings submitted by the parties, weighed the substance and credibility of all testimony and considered all relevant evidence. The record was left open until December 17, 2004 to allow written legal memoranda to be submitted by counsel. After receiving the timely submission of memoranda by counsel and closing the record, the Board determined the following:

FINDINGS OF FACT

1. The State of New Hampshire through its Department of Safety, Division of State Police ("Division") employs individuals, including detectives from certain public safety services and therefore is a public employer within the meaning of RSA 273- A:1, X.

2. The NH Troopers Association ("Association") is the certified exclusive bargaining representative for sworn personnel employed by the Division of State Police up to and including the grade of sergeant.

3. The current CBA provides that in the event there are "grievances and disputes arising with respect to interpretation or application of any provision of this

agreement" the last step in the resolution process provides for final and binding adjudication by the PELRB. (ARTICLE 14.1 and ARTICLE 14.5.1)

4. The Division and the Association have been parties to collective bargaining agreements ("CBA") separate from those covering other state employees for the periods 1997-99 (Association Exhibit #1), and for the period 1999-2001 (Association Exhibit #2). They are also parties to a current agreement that became effective in 2001 and by its terms, "shall remain in effect through June 30, 2003, or until such time as a new Agreement is executed." (Respondent's Exhibit #15, ARTICLE 22.1).

5. RSA 273-A:1,XI provides that "Terms and conditions of employment means wages, hours and other conditions of employment other than managerial policy within the exclusive prerogative of the public employer, or confided exclusively to the public employer by statute or regulations adopted pursuant to statute."

6. Prior to July 1, 2004, the Division of Administration, Department of Safety, charged only Division of State Police Employees eight hours of annual leave for each full shift taken as annual leave.

7. Prior to July 1, 2004, the Division of Administration, Department of Safety, charged only Division of State Police Employees eight hours of sick leave for each full shift taken as sick leave.

8. Prior to July 1, 2004, the members of the New Hampshire Troopers Association would fill out leave slips requesting only eight hours of annual leave for each full shift taken as annual leave.

9. Prior to July 1, 2004, the members of the New Hampshire Troopers Association would fill out leave slips requesting only eight hours of sick leave for each full shift taken as sick leave.

10. Hours taken as sick leave are considered hours worked for calculations of paid leave.

11. Prior to July 1, 2004, members of the New Hampshire Troopers Association would fill out leave slips requesting hour for hour (in increments of 15 minutes) of annual leave for any amount of time less than a full shift taken as annual leave.

12. Prior to July 1, 2004, members of the New Hampshire Troopers Association filled out a weekly duty report indicating the actual number of hours on leave for each day (e.g. 9 hours) and then the Division of Administration charged the trooper for 8 hours of sick or annual leave time.

13. Prior to July 1, 2004, in order to claim annual and/or sick leave, a trooper working a shift of more than 8 hours filled out an annual leave or sick leave request form indicating 8 hours of leave, filled out a weekly [report] indicating the actual number of hours missed for each day (e.g. 9 hours) and then the Division of Administration charged the trooper for 8 hours of sick or annual leave time.

14. The Association was formed in 1997. Prior to that time, troopers were covered by the terms of omnibus state employees' collective bargaining agreements negotiated by a previous exclusive representative. (Respondent's Exhibits #2-CBA, 1993-1995 and #12- CBA, 1995-1997). Thereafter, the Association and the State were parties to three successive CBA's. (Respondent's Exhibits #13-CBA, 1997-1999; #14 - CBA, 1999-2001; and #15 - CBA, 2001-2003).

15. The parties' CBA, effective 1993-1995, Respondent's Exhibit #12, contains a provision relative to annual leave that does not appear in subsequent CBA's between the parties, including that CBA effective 1997-1999, which represents the first agreement negotiated between the parties distinct from other bargaining units comprised of state employees. That provision in Article X states, "10.1.2. ACCOUNTING. For purposes of utilization, leave time shall be converted to hours." The parties did not abandon that language after 1995 as it related to Article XI – Sick Leave where, either at §11.1.1 or §11.1.2 in agreements before 1995 and after 1995 the parties incorporated such a conversion provision in their CBA's. (See Respondent's Exhibits #12, #13, #14, #15).

16. In 1997 the parties agreed to a revised work schedule that provided that members of the bargaining unit would be scheduled to work a total of one hundred and sixty (160) hours over a twenty-eight day period.

17. In 1997 the parties also agreed to implement a scheduling scheme that resulted in two distinct work patterns: detectives and administrative personnel were scheduled to work five, eight hour days followed by two days off over a sequence of four seven-day work periods, *i.e.* twenty-eight days, (5days X 8 hours = 40 hours X 4 work periods = 160 scheduled hours); the second pattern established was for "road troopers" who were scheduled to work six days including eight and one-half or nine hour shifts followed by three days off over a twenty-eight day cycle amounting to 160 work hours scheduled.

18. Prior to the schedule change in 1997, the road troopers had received twelve (12) days of annual leave and the parties continued to adhere to this policy under subsequent CBA's.

19. Discussions between the parties after a 1994 memo from the Division's representative (Manning) and negotiations between the parties for a CBA in 1997 did not result in any express language change directed to change or

clarify the leave deduction practice as it was being applied at that time. This resulted in a continuation of the policy of granting leave in the so-called "day for a day" manner irrespective of the number of hours comprising the shift.

20. Leave from duty for road troopers was recorded in two reports, "leave requests" and "weekly duty reports" also referred to as "weeklies". (See Association Exhibit #2). The system allowed a road trooper to "request" a shift off by indicating the leave time to be taken as 8 hours and indicate on his weekly report that he or she was off duty for a full shift regardless of whether that scheduled shift consisted of either 8.5 hours or 9 hours.

21. Supervising Sergeants and Troop Lieutenants had responsibility to oversee leave requests and weekly reports and had access to both documents for review and, if necessary, corrections. In some instances, supervisors who received a weekly report with a numeral "9" indicating hours to be deducted would correct or instruct administrative staff within the Troop to correct that integer to indicate the numeral "8" with knowledge gained by Division personnel from past experience that the trooper would only have 8 hours deducted by headquarters. (Testimony of Doucette)

22. From at least 1997 and, more probably than not since 1986, it was common practice within the department to deduct only eight hours of leave for each full shift a road trooper took as leave regardless of the length of the scheduled shift as comprising 81/2 hours or nine hours prior to July of 2004.

23. At some time prior to 1997 and perhaps as early as 1986, troopers, troop secretaries, payroll clerks and other administrative staff were either instructed or allowed to deduct fewer hours of leave than a trooper taking that shift off may have been scheduled to work.

24. In July 2004, the State implemented a strict "hour for hour" leave policy, *e.g.* if a road trooper was scheduled for a shift of 9 hours and the trooper had taken an entire shift as leave instead of working that shift, 9 hours of leave would be deducted rather than the apparent, and previously followed, practice of deducting only eight hours of leave from that trooper despite the length of the scheduled shift.

25. An effect of the July 2004 change in the number of hours deducted for a full shift taken as leave was that road troopers would no longer receive 12 days of annual leave, *i.e.* 12 complete shifts.

26. Both parties agree that in the circumstances where a trooper would request less than a full shift off as leave the practice of deducting leave had always been computed on an "hour for hour" deduction basis.

27. Employees at all levels of authority, management/supervisory employees, administrative staff and troopers were aware of this practice being used and in some instances supervisors would directly instruct new troopers in how to reconcile the two reports. (Testimony of Copponi, Doucette, St. Laurent)

28. Sgt. Dale St. Laurent, who had acted in the capacities of Corporal, Road Sergeant and Training Sergeant in the course of his long career within the Division of State Police, testified that his understanding for the continuation of the leave deduction policy was that "the system" could not process the recordation in any other way and that utilization of shift leave would continue to be applied on the "day for a day" basis.

29. Retired Sergeant Doucette also testified that there were difficulties within "the system" that perpetuated the practice of recording leave in full shift increments as "a day for a day" irrespective of the length of shift after 1986.

30. Reporting in the "day for a day" manner by road troopers was do, in part, to instruction by, or requirement of their immediate supervisors and common useage within the department over a long period of time.

31. As late as the last negotiated CBA, effective 2001, neither party suggested that the system was to be changed nor did management indicate any intent to do so.

32. Bruce Twyon was president of the Association over the period 1996-2002 and was involved in collective bargaining during three CBA's that were negotiated and administered. During that time his understanding was that reference to a shift in the context of leave was the equivalent to a reference to a day.

33. In CBA's since at least 1993 (See Respondent's Exhibit #2 – Sick Leave – Article #11) and continuing into the 1997 CBA (See Respondent's Exhibit #13 – Sick Leave – Article #11) the parties expressly stated that, "For purposes of utilization, sick leave shall be converted to hours." whereas no such express conversion provision exists in Article #10 – Annual Leave in either of those CBA's or in the most recent 2001-2003 CBA..

34. Thomas Manning, former Manager of Employee Relations and then Director of Personnel for the State was not responsible for the administration of leave policy within the Division of Safety at any time nor was he knowledgeable of how leave deductions were specifically computed within that Division during his time of service with the State although he was involved with negotiations of the parties' CBA's. Manning's recollection of the issue of scheduled shifts was that Captain O'Brien, representing the Division of Safety, and Corporal St. Laurent, representing the Association, "carried the heavy burden" in negotiating issues related to hours and scheduling during collective bargaining.

35. The Board accords evidentiary weight to the Manning memorandum of May 25, 1994 and letter of September 27, 1994 (Respondent's Exhibit #1), both of which reference an overtime calculation problem, to acknowledge that the practice of equating a full shift, comprised of greater than 8 hours, taken as leave to a deduction of 8 hours from the trooper's leave was in existence under the language present in the parties' CBA in effect at the time referred to in those documents.

36. Mr. Manning characterized the differences between personnel administration of work hours for most state employees and administration of work hours for law enforcement as creating two "different cultures", one in which he worked, *i.e.* non-law enforcement, and the other reserved to the Department of Safety. On cross-examination he admitted that "Sometimes little details would slip through." His purpose in writing his September 27, 1994 letter was to address one of those details.

37. The Division of State Police maintains a manual of Professional Standards of Conduct. Chapter 22-G, entitled "Weekly Duty Report", gives several instructions for the completion of various portions of a trooper's weekly report and was unilaterally revised by the Division effective April 24, 2000 and was not part of the parties' negotiations to the extent that it contravenes terms and conditions of employment between the parties. (See Respondent's Exhibit #6).

38. Neither Lt. Myrdek nor Col. Booth has ever participated in any of the negotiations between the parties and therefore there testimony shed little, if any, light on the discussions undertaken at those negotiations regarding the interpretation of any of the terms brought into question here.

39. The discrepancy, according to Col. Booth, was first raised by a payroll clerk in or about May 2003 who noticed that a request for leave and a weekly report filed by a trooper were inconsistent in the hours that appeared on each. Col. Booth's response was to ask for clarification from Tim Mason, an administrative person connected with payroll.

40. Approximately a year after the payroll clerk questioned superiors regarding the manner of deducting leave that was in existence at that time, Claude Ouellette, an administrator with the Division authored a memorandum wherein he stated, "my office has been improperly deducting [leave]." Further in that same memo he states, "This situation cannot be allowed to continue." He then proceeds to state that effective July 1, 2004, "we will be deducting leave time consistent with whatever [the troopers] regularly scheduled daily hours happen to be."

ORDER

JURISDICTION

The PELRB exercises primary jurisdiction to adjudicate complaints between public employers and their employees or exclusive bargaining representatives that allege an improper labor practice caused by a party breaching a collective bargaining agreement ("CBA") as described in RSA 273-A:5 I(h) or II (f). In addition to this authority, jurisdiction in this matter is also vested in the PELRB by the prior assent of the parties as expressed in the grievance procedure of their CBA that an alleged breach of the parties' CBA is to be submitted to the PELRB by either party and that the PELRB's decision is "final and binding". §14.5.1, Respondent's Exhibit #15, Collective Bargaining Agreement 2001-2003.

DECISION SUMMARY

This case requires the PELRB to determine whether or not actions of the Division of Safety implemented on July 1, 2004 regarding the manner of deducting annual leave and sick leave from troopers who take a full shift of such leave constitutes a breach of the parties' collective bargaining agreement. To do so the Board has examined the language used by the parties in their collective bargaining agreement and determined that it is ambiguous or that the parties' actions evidence their acceptance of a practice not specifically expressed in the CBA. The Board has determined that a *bona fide* past practice developed between the parties and that that practice established a term or condition of work. Since we find the condition that has provided a benefit to the troopers for many years to be subject to good faith negotiations, the Division could not modify the practice unilaterally without first negotiating with the Association. We therefore find that the Division breached its agreement with the Association and committed an improper labor practice beginning on July 1, 2004 through its failure to maintain the *status quo* and failure to negotiate a modification to the leave deduction policy prior to its implementation, especially during a *status quo* period between the parties, as further explained below.

DISCUSSION

The Division and troopers have enjoyed the mutual benefits and stability afforded them through the collective bargaining process since at least 1986. Since then, the parties have negotiated several collective bargaining agreements (CBA). During a period ending in 1997, the members of this bargaining unit, sworn state police employees up to and including the grade of sergeant, (Finding of Fact #2) were part of a larger bargaining unit comprised of all eligible state employees. Since 1997 and continuing to the present, the parties have negotiated separate collective bargaining agreements limiting the terms and

conditions of work to apply only to those sworn personnel characterized above. Their negotiations have resulted in CBA's covering the years 1997-1999 (Respondent's Exhibit #13); the years 1999-2001 (Respondent's Exhibit #14) and the years 2001-2003 (Respondent's Exhibit #15). Negotiations since the expiration of the 2001-2003 CBA have been unsuccessful and therefore the terms and conditions of work remain in place until there is a successor agreement under the so-called "*status quo doctrine*". It is well settled in New Hampshire that:

> "The principle of maintaining the status quo demands that all terms and conditions of employment remain the same during collective bargaining after a CBA has expired. This does not mean that the expired CBA continues in effect; rather, it means that the conditions under which the [employees] worked endure throughout the collective bargaining process." *Appeal of Milton School Dist.*, 137 N.H. 245 at 247; *Appeal of Alton School District, et al.*, 140 N.H. 303; *Appeal of Nashua School Board of Education,* 141 N. H. 768.

The parties' most recent CBA addresses annual leave in ARTCLE X and sick leave in Article XI. Since at least 1997, when the Association and the Division negotiated separately for members of this unit, the relevant provisions affecting these two articles of their CBA's have not changed in relevant part. The relevant portions for annual leave are as follows:

"ARTICLE X

ANNUAL LEAVE

10.1. Employees will be entitled to annual leave with full pay based on the formula given below. Each employee's entitlement shall be computed at the end of each completed month of service. Annual leave shall be cumulative for not more than the prescribed days and shall not lapse.

Continuous Years Worked	Accrued/ Month	Years/Max.
0 thru 1	1 day	12*
2 thru 5	1 ¼ days	15/32
6 thru 10	1 ½ days	18/38
11 thru 15	1 ¾ days	21/44
15 plus	2 days	24/50

1 ¼ days = 10 hours; 1 ½ days = 12 hours
1 ¾ days = 14 hours; 2 days = 16 hours"

and regarding sick leave, as follows

"ARTICLE XI

SICK LEAVE

11.1. Full-time employees in the bargaining unit will be entitled to accrue sick leave in accordance with the formula given below. The purpose of sick leave is to afford employees protection against lost income for absences due to illness or injury and, in particular long-term disability due to catastrophic illness or injury. Sick leave is not intended to supplement other leave provisions of this Agreement and is intended to be used only for the purpose set forth herein. Sick leave shall be computed at the end of each completed month of service. Sick leave shall be cumulative for not more than the prescribed days and shall not lapse.

Continuous Years Worked	Accrued/ Month	Years/Max.
0 thru 8	1 ¼ days	15/90
9 thru 15	1 ¼ days	15/105
16 plus	1 ¼ days	15/120

1 ¼ days = 10 hours

Employees in their first (6) six months of service accrue sick leave and may use accrued sick leave as soon as it accrued.

11.1.1 For purpose of utilization, sick leave shall be converted to hours."

During the existence of these two provisions, the instant case reveals a course of dealings between contractual parties, characterized in labor law as "past practice." Prior to July 1, 2004 the parties agree on one of the conditions under which these employees worked. This condition was that the Division charged the members of this bargaining unit only eight (8) hours of either annual or sick leave, when a full shift of such leave was taken. (Findings of Fact #6 and #7, as stipulated by the parties). Further, this was the practice regardless of the fact that the member's scheduled shift from which he or she had taken leave consisted of a period of time in excess of eight (8) hours. (Findings of Fact #12, #21). The evidence reveals that members had been regularly scheduled to work in excess of eight (8) hour shifts since approximately 1986 following a determination by the Division, in light of a decision of the United States Supreme Court, see *Garcia v. San Antonia Metro Transit Authority,* 469 U.S. 528 (1985), that the members of the Association were subject to the Federal Fair Labor Standards Act. After changing the

length of shifts in or about 1986 to exceed eight (8) hours, the continuation of the practice of limiting the amount of leave charged against a trooper to eight (8) hours, despite a longer shift, as acknowledged in 1994 (See Manning letter and memorandum, Respondent's Exhibit #1). The parties again negotiated the terms and conditions of work for a collective bargaining agreement in 1997 and these negotiations were undertaken at a time when the length of shifts were changed to lengths of 8.5 hours and 9 hours in length. The length of these longer shifts and the limitation on the leave time charged to 8 hours has continued as a condition of work over the course of three successive collective bargaining agreements between these two parties.

There is sufficient credible testimony to establish that over the course of the employment relationship between these parties and during negotiations over many years the troopers made their interest, concern and position obvious to the Division regarding the accumulation of leave time and how it would be deducted. The common reference utilized by the parties to confirm that the past practice was going to be adhered to in the future was the phrase "day for a day". The term "day for a day" took on even greater significance as, on two occasions the troopers' shift, or workday, lengthened. This term was raised in the context of negotiations and, while neither of the parties substituted or modified relevant express language in the parties' CBA's that would have clarified the practice, it continued openly. With this condition of work existing over such a substantial period of time, the affirmative actions taken of correcting reporting forms, the volume of occasions on which the calculations and leave time reductions were undertaken, and the widespread use and duration of reporting full shifts taken as leave of only eight (8) hours convince us that the course of dealings established a past practice. This past practice provided that regardless of the number of leave hours scheduled or reported to the Division by members taking a full shift or day off as annual or sick leave, that member was only charged with eight (8) hours of leave.

A course of dealing between contractual parties in the context of labor law is commonly referred to as a past practice and such historic conduct is often examined to determine more specifically what terms and conditions exist between, in this circumstance, a public employer and its employees. In this matter we find the existence of language in the parties' CBA related to annual and sick leave that is reasonably susceptible to more than one interpretation. First, while the parties agree that prior to July 1, 2004, after the expiration of the CBA and during the period of *status quo*, annual leave and sick leave were treated the same when applied to full shifts and less than full shifts, *i.e.* hourly basis, there is no proportional utilization statement in Article X regarding annual leave and there is in Article XI regarding utilization of sick leave. (See Respondent's Exhibit #15 – CBA 2001-2003, § 11.1.1). Such a specific provision in one article and not the other, that referring to annual leave, allows, we think, reasonable people to believe that the parties did not intend that both sick leave utilization and annual leave utilization be treated in the same manner. However, the parties have stipulated that in practice they were. This ambiguity alone leaves us perplexed, but the obvious and protracted practice followed by the parties alleviates us from finding any ambiguity before determining, outside the written word, what these parties had agreed to as the terms and conditions to be honored. The Restatement (Second) of Contracts § 223

(1981), comment (b) provides, " There is no requirement that an agreement be ambiguous before evidence of a course of dealing can be shown, nor is it required that the course of dealing be consistent with the meaning of the agreement would have apart from the course of dealing." (See also Elkouri and Elkouri, How Arbitration Works, 5th ed., Washington, D.C., Bureau of National Affairs, 1997, p.632 and Roberts' Dictionary of Industrial Relations, 4th ed., Washington, D.C., Bureau of National Affairs, 1994, page 573). Beyond the treatment of past practice by those authorities, in this case the parties have stipulated to the fact of the existence of the course of dealing, or past practice.

As the accumulation of leave is a negotiated condition of work, it is reasonably and fairly characterized as a benefit. The existence of this benefit is the result of the parties' negotiations and conduct over a substantial period of time. Over the course of this time, the parties negotiated several collective bargaining agreements. There is sufficient credible testimony to establish that over a substantial period of time, eighteen years from the *Garcia* decision and seven years from the formation of a separate bargaining unit represented by the Association, that there was a past practice in place. One common practice was that a member who took a full shift off as either annual or sick leave would be charged only eight (8) hours of leave regardless of the length of his or her scheduled shift. A second common practice established that if a member took a partial shift off as either annual or sick leave that member was charged on an hour for hour basis, *e.g.* 3 hours off requested, taken and reported resulted in a charge of 3 hours from accumulated leave, 2 hours of leave used resulted in 2 hours charged and so forth. These practices between the parties resulted in the members, in essence, accumulating or maintaining leave time at a level in excess of an "hour for hour" if they took a full shift or day off. This is clearly a benefit that has accrued to the members of the Association and that has survived at least three rounds of negotiation between these parties.

As we have often referenced, the court has provided us with a three-pronged test to resolve issues of negotiability. Appeal of State of N.H., 138 N.H. 716, 722.

> "First, to be negotiable, the subject matter of the proposed contract provision must not be reserved to the exclusive managerial authority of the public employer by the constitution, or by statute or statutorily adopted regulation." *Id.* "Second, the proposal must primarily affect the terms and conditions of employment, rather than matters of broad managerial policy." *Id.* "Third, if the proposal were incorporated into a negotiated agreement, neither the resulting contract provision nor the applicable grievance process may interfere with public control of governmental functions contrary to the provisions of RSA 273-A:1,XI." *Id.*

"A matter that fails step one is a prohibited subject of bargaining. A matter that satisfies step one but fails either step two or three is a permissible topic of negotiations. A matter that satisfies all three steps is a mandatory subject of collective bargaining. Appeal

of New Hampshire Troopers Association, 145 N.H. 288, 292, citing Appeal of City of Nashua Board of Education, 141 N.H. 768, 774. We see no reason to hold that the amount, accumulation and calculation of the utilization of annual leave or sick leave is not negotiable and therefore not subject to be changed by a unilateral decision of the Division.

The amount of leave or the rate at which leave is to be deducted from an employee is not (1) reserved to the exclusive control of management by any statute and other personnel rules or regulations that may encroach on benefits which have been bargained for are subordinate to contractual provisions in which they are in conflict; (2) does primarily affect a condition of employment that has existed for many years rather than matters of broad managerial policy; and (3) if the past practice of leave deduction continues and is seen as part of the parties' bargained for exchange, the resulting contract provision can not be reasonably said to interfere with public control of governmental functions contrary to the provisions of RSA 273-A:1, to wit, "The phrase 'managerial policy within the exclusive prerogative of the public employer' shall be construed to include but not be limited to the functions, programs and methods of the public employer, including ...the selection, direction and number of its personnel, so as to continue public control of governmental functions."

The pervasive existence of this condition of work, the continuation of the practice for a year even following its alleged first discovery by a payroll clerk after many years of existence, and multiple agreements between the parties over that period of time lead us to the conclusion that both parties had knowledge that the practice existed and by their respective actions over the protracted period of time demonstrated acceptance of it. There is no evidence that this case presents a situation requiring complicated analysis that could only be performed by advanced technology to reveal the existence of a mathematical discrepancy such as that which the Board determined in Decision # 2003-029 [lack of acceptance of practice due to lack of knowledge of its existence] previously presented by these same parties. Nor do the facts of this case present a situation clearly involving a right reserved to management and not a mandatory subject of bargaining as the Board determined in Decision #2004-014 [despite passage of time over which holiday work was assigned, a management right to set schedules expressly reserved in contract language could not be abdicated outright or subordinated to parole evidence of past practice] also previously presented by these same parties.

Therefore, we find that the Division's unilateral action changing the manner by which leave is charged or deducted from a member's accumulated leave constituted a failure to maintain *status quo* terms and conditions of employment between itself and the affected members of the Association. This failure represents a breach of the parties' agreement and a statutory violation of RSA 273-A:5,I (h). The Division is herby ordered to restore accumulated annual leave and sick leave to those members affected by the change in the manner of leave deduction implemented on and after July 1, 2004 through the date of this order and to cease and desist from future deductions of annual leave or sick leave usage for a number of hours greater than eight (8) hours for each full shift

taken as either annual leave or sick leave by members of the association and otherwise return to the *status quo ante* July 1, 2004.

So Ordered.
Signed this16thday of March , 2005

Jack Buckley, Chairman

By unanimous vote. Chairman Jack Buckley presiding with Board Members Seymour Osman and E. Vincent Hall also voting.

DISTRIBUTION:

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